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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

In re H. S., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

H. S.,

Defendant and Appellant.

C061475

(Super. Ct. No. 64233)

In the course of a fight in the parking lot of Kentucky Fried Chicken, the minor, H. S., pulled out a knife and swung it at the victim, J. M. J.M.'s head was cut open and he was left with several scars. The minor was charged with assault with a deadly weapon (a knife) and criminal threats. It was further alleged the minor had personally used a deadly weapon and personally inflicted great bodily injury.

Following a contested hearing, the court found the minor had committed the assault with a deadly weapon and also found the personal use of a deadly weapon allegation true. The court

found insufficient evidence to sustain the remaining allegations.

In sentencing the minor, the court took judicial notice of the minor's three prior adjudications, for which there were maximum confinement times of one year, six months. The court determined, with aggregation, the minor's maximum term of confinement was five years eight months.

On appeal, the minor contends the personal use sentencing enhancement should be stricken and the maximum period of confinement should be corrected to four years eight months. The People do not address the first point, but properly concede the latter. We agree with the minor on both points.

DISCUSSION

Penal Code¹ section 12022, subdivision (b)(1) provides, in relevant part: "Any person who personally uses a deadly or dangerous weapon in the commission of a felony . . . shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, *unless the use of a deadly or dangerous weapon is an element of that offense.*" (Italics added.) Aggravated assault in violation of section 245, subdivision (a)(1) requires proof that the perpetrator assaulted another person "with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury"

¹ All further section references are to the Penal Code.

Section 245, subdivision (a)(1) can, of course be violated without using a deadly weapon or dangerous instrument. Accordingly, we look to the actual conduct and the means of the assault to determine whether the use of a deadly or dangerous weapon is an element of the offense for purposes of the exception in section 12022, subdivision (b)(1). Where the violation is factually based on the use of a deadly or dangerous weapon, then its use becomes an element of the offense, and an additional enhancement under section 12022, subdivision (b)(1) is barred. (*People v. McGee* (1993) 15 Cal.App.4th 107, 110; see *People v. Summersville* (1995) 34 Cal.App.4th 1062, 1069-1070.)

Here, the petition alleged, and the evidence established, that the minor committed "an assault with a deadly weapon, to-wit: A KNIFE." The petition also alleged the minor "in the commission [of the assault], the minor personally used a deadly and dangerous weapon, to wit: A KNIFE." The use of the knife was how the assault was committed, an element of the offense. Accordingly, the enhancement allegation must be stricken. (*People v. McGee, supra*, 15 Cal.App.4th at p. 117.)

As also argued by the minor, and properly conceded by the People, the minor's maximum time of confinement was not five years eight months, but four years eight months.

DISPOSITION

The section 12022 enhancement is stricken. The maximum period of confinement is reduced to four years eight months. In all other respects, the judgment is affirmed.

ROBIE _____, J.

We concur:

NICHOLSON _____, Acting P. J.

BUTZ _____, J.